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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Defendant-Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,

Plaintiffs-Appellees.

On Appeal From The United States District Court For The Eastern District Of Wisconsin

MOTION TO AFFIRM.

PHILIP H. PORTER
708 First National Bank Bldg.
Madison 3, Wisconsin

JAMES P. CLANCEY
Peninsula Bank Building
Ishpeming, Michigan
Attorneys for the Lake Superior and Ishpeming Railroad Company

R. K. MERRILL
JOSEPH J. NAGLE
FRANK M. LONG
888 Union Station Bldg.
Chicago 6, Illinois
Attorneys for the Chicago, Milwaukee, St. Paul and Pacific Railroad Company

RICHARD R. ROBINSON
225 E. Mason Street
Milwaukee 2, Wisconsin
Attorneys for Plaintiffs-Appellees

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TABLE OF CONTENTS

	PAGE
MOTION TO AFFIRM	1
QUESTION PRESENTED	2
STATEMENT	2
ARGUMENT	4
I. The Limited Scope of This Appeal	4
II. The Lower Court Acted Within Its Power	5
III. The Idaho and Powell Cases Should Not Be Overruled	12
IV. Appellant's Authorities Are Not In Point	13
CONCLUSION	17
CERTIFICATE OF SERVICE	18

INDEX TO CITATIONS

Cases Cited

Alabama Ry. v. Jackson Ry., 271 U.S. 244, 46 S.Ct. 535, 70 L.ed. 928 (1926)	6
Ches. & Ohio Ry. v. United States, 283 U.S. 35, 51 S.Ct. 337, 75 L.ed. 824 (1931)	6
Chicago, M.,St.P. & P.R.Co. v. Chicago & E.I. R.Co., 198 F.2d 8 (U.S.C.A. 7, 1952)	9
Chicago, Milwaukee, St.P. & P.R.C. v. Northern Pac. R.Co., 120 F. Supp. 710 (D.C.W.D. Wash., 1954)	9
Chicago, Milwaukee, St. Paul & Pacific R. Co. v. United States, 214 F.Supp. 244 (D.C.E.D. Wis., 1963)	4
Connecticut Co. v. Power Comm'r, 324 U.S. 515, 65 S.Ct. 749, 89 L.ed. 1150 (1945)	11

PAGE

Florida v. United States, 282 U.S. 194, 51 S.Ct. 119, 75 L.ed. 291 (1931) 11

Gray v. Powell, 314 U.S. 402, 62 S.Ct. 326, 86 L.ed. 301 (1941) 6

King v. United States, 344 U.S. 254, 73 S.Ct. 259, 97 L.ed. 301 (1952) 6

Leelaneau Transit Co. Abandonment, Northport Branch, 307 I.C.C. 95 (1959) 9

North Carolina v. United States, 325 U.S. 507, 65 S.Ct. 1260, 89 L.ed. 1760 (1945) 11

Phillips Co. v. Dumas School Dist., 361 U.S. 376, 80 S.Ct. 474, 4 L.ed. 2d 384 (1960) 5

Piedmont & Nor. Ry. v. United States, 280 U.S. 469, 50 S.Ct. 192, 74 L.ed. 551 (1930) 8

Powell v. United States, 300 U.S. 276, 57 S.Ct. 470, 81 L.ed. 643 (1937) 7-8, 10, 12, 13, 17

Rochester Tel. Corp. v. U. S., 307 U.S. 125, 59 S. Ct. 754, 83 L.ed. 1147 (1939) 8

Securities Comm'n v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454, 87 L.ed. 626 (1943) 11

Shields v. Utah Idaho R. Co., 305 U.S. 177, 59 S.Ct. 160, 83 L.ed. 111 (1938) 14-15

Singer & Sons v. Union Pacific R.Co., 311 U.S. 295, 61 S.Ct. 254, 85 L.ed. 198 (1940) 9-10

Southern Pac. Co. v. Western Pacific California R.Co., 61 F.2d 732 (C.C.A. 9, 1932) 9

State of Illinois v. United States, 213 F.Supp. 83 (D.C.N.D. Ill. 1962) 15-16

St. Louis S.W. Ry. v. Mo. Pac. R. Co., 289 U.S. 76, 53 S.Ct. 516, 77 L.ed. 1042 (1933) 10

Texas & Pac. Ry. Co. v. Gulf, Etc., Ry., 270 U.S. 266, 46 S.Ct. 263, 70 L.ed. 578 (1926) 3, 9, 10

PAGE

United States v. Capital Transit Co., 325 U.S. 357, 65 S.Ct. 1176, 89 L.ed. 1663 (1945) 11

United States v. Drum, 368 U.S. 370, 82 S.Ct. 408, 7 L.ed. 2d 360 (1962) 14

United States v. Idaho, 298 U.S. 105, 56 S.Ct. 690, 80 L.ed. 1070 (1936) 7, 12, 13, 15, 17

United States v. Jones, 336 U.S. 641, 69 S.Ct. 787, 93 L.ed. 938 (1949) 16

United States v. Pierce Auto Lines, 327 U.S. 515, 66 S.Ct. 687, 90 L.ed. 821 (1946) 14

Yonkers v. United States, 320 U.S. 685, 64 S.Ct. 327, 88 L.ed. 400 (1944) 11, 12, 13

Statutes Cited

Interstate Commerce Act:

Sec. 1(18), 49 U.S.C. Sec. 1(18) ..... *passim*
Sec. 1(20), 49 U.S.C. Sec. 1(20) ..... *passim*
Sec. 1(21), 49 U.S.C. Sec. 1(21) 2, 5
Sec. 1(22), 49 U.S.C. Sec. 1(22) ..... *passim*
Sec. 204(c), 49 U.S.C. Sec. 304(c) 14
Sec. 209(a)(1), 49 U.S.C. Sec. 309(a)(1) 14

Railway Labor Act, sec. 151, 48 Stat. 1185, 45 U.S.C. 151 15

Railway Mail Pay Act, 39 Stat. 412, 39 U.S.C. 523-568 16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 710

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Defendant-Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY.

Plaintiffs-Appellees.

On Appeal From The United States District Court For The Eastern District Of Wisconsin

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MOTION TO AFFIRM.

Appellees in the above entitled case, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move this Court to affirm the final judgment and decree of the District Court on the ground the question on this appeal is so unsubstantial as not to warrant consideration by this Court.

QUESTION PRESENTED.

The question presented by appellant's Jurisdictional Statement can be stated simply:

Does the ultimate judicial power to decide that the Republic Junction connection was not an "extension" of a line of railroad within the meaning of section 1(18) of the Interstate Commerce Act reside in the District Court or in the Interstate Commerce Commission?

STATEMENT.

This is a direct appeal from the decision of the District Court that the connection between the tracks of the Milwaukee and Ishpeming at Republic Junction, Michigan, was within the exception of section 1(22) of the Interstate Commerce Act and, therefore, not an "extension" of their respective lines of railroad within section 1(18). Defendants below were the United States of America and the Interstate Commerce Commission. Appellant and the Duluth South Shore and Atlantic Railroad Company, now the Soo Line Railroad Company, intervened as defendants. The Department of Justice, the Soo Line, and the Interstate Commerce Commission, by electing not to join in this appeal, have accepted the decision of the District Court.

This litigation commenced before the Interstate Commerce Commission with the filing of a complaint by the South Shore alleging the connection was an "extension" of appellees' respective lines of railroad within section 1(18) of the Act and requesting the Commission to investigate and require appellees to comply with sections 1(18) through 1(21). Appellees' reply averred the connecting track was not a section 1(18) extension, but was excepted therefrom by section 1(22).

No defendant or intervening defendant below applied to a district court for an injunction under section 1(20) of the Act, a procedure by which the status of the track might readily have been determined. Appellant chose to litigate only before the Interstate Commerce Commission and itself failed to pursue the only available procedure by which it could have sought the closing of the connection prior to the Commission's final order.

In response to the complaint before it the Commission suggested by letter that the connection might be an "extension" within section 1(18) and that appellees should file a section 1(18) application for a public convenience and necessity certificate permitting the new construction. In compliance with the Commission's suggestion, appellees made such an application[1] accompanied by a motion to dismiss same on the ground the Commission had no jurisdiction over the connection in that it was not an "extension" under section 1(18). Appellant and the South Shore Railroad intervened in opposition to the application.

Upon entry of the Commission's final order in April 1960, appellees brought this suit seeking to annul, set aside and enjoin the enforcement of the Commission's orders. On appellees' motion after notice and hearing, the District Court, to preserve the status quo which had existed since the connection was built, issued a preliminary injunction on June 13, 1960, against any attempt to enforce the Commission's orders pending final disposition of the cause. Pursuant thereto the connection remained open, and operations thereover continued.

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[1] Filing such an application is not an admission that the new tracks are an "extension" requiring a section 1(18) certificate. *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266, at 273, 46 S. C. 263, 70 L. ed. 578, at 588 (1926).

ARGUMENT.

I.

The Limited Scope of This Appeal.

Three distinct and separate issues were before the lower court:

1. Whether the Interstate Commerce Commission had power to enter a cease and desist order prohibiting operation of the connection.

2. Whether the Republic Junction connection was an "extension" within section 1(18) of the Interstate Commerce Act or whether section 1(22) excepted it from the requirements thereof.

3. Whether the Commission's finding that public convenience and necessity did not warrant issuance of a certificate under section 1(18) was arbitrary, capricious, an abuse of discretion and not grounded on the evidence of record.

Only the second of such issues was decided by the District Court. The issue relating to the Commission's cease and desist order became moot because the Commission meanwhile had rescinded it. The third issue, as the Court correctly held, would have required adjudication only in the event the connection were found to be an "extension" and thus within the jurisdiction of the Commission. *Chicago, Milwaukee, St. Paul & Pacific R. Co.* v. *United States*, 214 F.Supp. 244, at 247, 250 (D.C.E.D. Wis., 1963).

Appellant does not allege in its Jurisdictional Statement that the District Court erred in holding that the connecting track is within the purview of section 1(22)

and does not argue that it is an "extension" within section 1(18) of the Interstate Commerce Act. Since this issue is not raised in the Jurisdictional Statement, it is not before this Court on this appeal. Supreme Court Rule 15, par. 1(c)(i); *Phillips Co.* v. *Dumas School Dist.*, 361 U.S. 376, at 386, 80 S.Ct. 474, 4 L.ed. 2d 384 (1960).

The Jurisdictional Statement asserts only that the District Court erred in presuming to determine the status of the connection under sections 1(18)-1(22) of the Act. Appellant suggests the District Court's decision was an unwarranted intrusion into the province of the Commission and that the Commission itself should be the final arbiter of what powers were granted it by Congress.

Were appellant's issue of great public importance, the Interstate Commerce Commission or the United States certainly would have brought the question to this Court. Neither of them appealed from the decision of the District Court; nor did the Soo Line. This lack of support from appellant's co-defendants below indicates not only the validity of the lower Court's decision but also the absence of any substantial question of general public importance.

II.

The Lower Court Acted Within Its Power.

By stating, at page 247 of 214 F.Supp.,[2] that the "final determination" whether a track is an extension is for the court, the lower Court observed that the question before it was one of statutory construction not committed by Congress to the Commission for ultimate adjudication. This issue contrasts markedly with one concerning rea-

[2] Jurisdictional Statement, Appendix A, page 19.

sonableness of a rate or whether public convenience and necessity require a grant of authority. Such questions require the exercise of the Commission's administrative expertise and are exclusively within the Commission's power to decide. *Ches. & Ohio Ry.* v. *United States,* 283 U.S. 35, 51 S.Ct. 337, 75 L.ed. 824 (1931); *Gray* v. *Powell,* 314 U.S. 402, 62 S.Ct. 326, 86 L.ed. 301 (1941); *King* v. *United States,* 344 U.S. 254, 73 S.Ct. 259, 97 L.ed. 301 (1952).

Appellant wrongly equates construing a Federal statute with defining public interest and argues that both should be decided by the Commission and reviewed by the courts only for an abuse of administrative discretion. Such is not the law.

If a track is within the exception of section 1(22), the Interstate Commerce Commission is devoid of jurisdiction to determine any matter relating thereto. Only if a track is an "extension" under section 1(18), and not excepted by section 1(22), is the Commission empowered by Congress to regulate its construction. In *Alabama Ry.* v. *Jackson Ry.,* 271 U.S. 244, at 249, 46 S.Ct. 535, 70 L.ed. 928 (1926), this Court stated:

> "The only limitation set by Transportation Act, 1920, upon the broad powers conferred upon the Commission over the construction, extension and abandonment of the lines of carriers in interstate commerce, is that introduced as paragraph 22 of § 1, which excludes from its jurisdiction 'spur, industrial, team switching or side tracks, located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.'"

The Interstate Commerce Act expressly withholds power from the Commission to make any adjudication regarding a section 1(22) track.

The District Court decided only that the Republic Junction connection was excluded from the Commission's section 1(18) jurisdiction by the operation of section 1(22). The Court did not set aside the Commission's order for error or irregularity on a matter within the jurisdiction of the Commission; rather, it denied the initial jurisdiction of the Commission under section 1(18).

This is a matter of statutory construction, to adjudicate which a Federal court, not the Commission, is vested with jurisdiction. The decision in *United States* v. *Idaho*, 298 U.S. 105, at 109-110, 56 S.Ct. 690, 80 L.ed. 1070 (1936), stated:

> "For whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the Federal or a state Commission.
>
> "This suit is not one brought to set aside for error or irregularity an order of the Commission on a matter within its jurisdiction. . . . Here, the jurisdiction of that Commission was challenged."

In *Powell* v. *United States*, 300 U.S. 276, at 287, 57 S.Ct. 470, 81 L.ed. 643 (1937), this Court stated:

> "Unless the project is one covered by § 1(18), the commission is not authorized by the Act to consider whether it is in the public interest and, for lack of jurisdiction to determine that question, it must deny the application.
>
> "Upon presentation by the carrier of application for a certificate, the commission, for the purpose of determining whether it is authorized by the Act to consider the merits, may pass incidentally upon the

> question whether the project is one covered by §1(18). But the decision of that question is for the court in either a suit to set aside an order granting a certificate or in a suit under §1(20) to enjoin a violation of §1(18). The function of the court is to construe that paragraph; that of the commission is to determine whether the project, if it is one covered by the paragraph, is in the public interest."

The lower Court did not purport to decide a factual question[3] or to overrule a discretionary act of the Commission. It merely construed sections 1(18)-1(22) with regard to the Republic Junction connection.

In *Piedmont & Nor. Ry.* v. *United States,* 280 U.S. 469, at 476, 50 S.Ct. 192, 74 L.ed. 551 (1930), this Court held:

> "But neither the assumption of jurisdiction by the Commission nor its denial of the application can operate as *res judicata* of the Railway's claim of immunity. If, as is contended, the Commission was without jurisdiction, the Railway is as free to proceed with the construction as if the application had not been made and the Commission had not acted. Nothing done by the Commission can prejudice the Railway's claim to immunity in any other proceeding."

And at page 477 of 280 U.S., the decision observes:

> "The relief which plaintiffs seek is not from the order but from the uncertainty as to the applicability of the statute."

Rochester Tel. Corp. v. *U. S.,* 307 U.S. 125, at 132-134, 59 S.Ct. 754, 83 L.ed. 1147 (1939), is of similar import.

The Commission itself recognized the jurisdiction of the courts to make the ultimate determination of such

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[3] There has never been in this case any dispute as to the extent, character or operation of the connecting trackage.

a question in *Leelanau Transit Co. Abandonment, Northport Branch*, 307 I.C.C. 95, at 102 (1959), where it stated:

> "The Supreme Court of the United States has held that whether trackage is a 'spur' is a mixed question of law and fact left by Congress to the decision of a competent court, not to final determination of either the Federal or a State commission."

That the issue of exclusion under section 1(22) is a judicial rather than an administrative question is attested by cases arising under section 1(20) of the Act. That provision permits an interested party to apply initially to a Federal district court for an injunction prohibiting construction or abandonment not complying with section 1(18). If the track involved is not an "extension", it is excluded from section 1(18) requirements, and the complaint must be dismissed.

The issue in a section 1(20) proceeding is identical to the issue decided by the District Court herein: Is the track a section 1(18) "extension", or is it excluded from the Commission's jurisdiction by section 1(22). Prior Commission determination is not a prerequisite to such a proceeding. *Texas & Pac. Ry. Co.* v. *Gulf, Etc., Ry.*, 270 U.S. 266, at 273-274, 46 S.Ct. 263, 70 L.ed. 578. (1926); *Chicago, M.,St.P. & P.R.Co.* v. *Chicago & E.I. R.Co.*, 198 F.2d 8 (U.S.C.A. 7, 1952); *Southern Pac. Co.* v. *Western Pacific California R.Co.*, 61 F.2d 732 (C.C.A. 9, 1932); *Chicago, Milwaukee, St.P. & P.R.Co.* v. *Northern Pac. R.Co.*, 120 F.Supp. 710, at 712 (D.C.W.D. Wash., 1954).

Congress left the power to decide such an issue in the Federal courts; it was not delegated to the Commission. As this Court held in *Singer & Sons* v. *Union Pacific R.Co.*, 311 U.S. 295, at 313-314, 61 S.Ct. 254, 85 L.ed. 198 (1940), the issue here:

". . . is by paragraphs (18) and (22) of §1 made a judicial, not an administrative question . . . .

"The court is thus called upon to decide no administrative issue which must be submitted to the Commission in advance of suit, and any decree which it may render involves no embarrassment to the Commission or otherwise in the administration of the act."

The *Texas* decision stated at page 273 of 270 U.S.:

"But a party in interest who is opposed to the construction is not authorized by the Act to initiate before the Commission any proceeding concerning the project. If application for a certificate has been made, he may appear there in opposition. If no such application has been made, paragraph 20 affords him the only remedy. That remedy is both affirmative and complete."

The decision in *Powell* v. *United States,* 300 U.S. 276, at 287-288, 57 S. Ct. 470, 81 L.ed. 643 (1937), held:

"The Central was not authorized by the Act to initiate a proceeding before the commission to determine whether the Seaboard's use of the leased tracks was or would be in the public interest. If application for a certificate had been made, the Central could have appeared in opposition. The Seaboard not having made application, the Central's sole remedy was a suit under § 1(20). That paragraph provides the only method for enforcing § 1(18) . . . . The remedy provided by § 1(20) is clearly inconsistent with a proceeding before the commission to attain the same end."

Similar language appears in *St. Louis S. W. Ry.* v. *Mo. Pac. R. Co.*, 289 U.S. 76, at 81-82, 53 S.Ct. 516, 77 L.ed. 1042 (1933).

Appellant thus fails to recognize the distinction laid down by this Court in *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80, at 94, 63 S.Ct. 454, 87 L.ed. 626 (1943):

> ". . . If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency — of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law."

Such considerations dictate the necessity for the Commission to make an initial determination of its jurisdiction. The Commission must make an express jurisdictional finding not, as appellant contends, because the Commission's mandate to do so is exclusive but in order that state and local interests may be assured of the proper safeguards provided by Congress and that reviewing courts may have the benefit of the Commission's expert judgment. *Yonkers* v. *United States*, 320 U.S. 685, at 692, 64 S.Ct. 327, 88 L.ed. 400 (1944); see also *North Carolina* v. *United States*, 325 U.S. 507, at 511, 65 S.Ct. 1260, 89 L.ed. 1760 (1945), *United States* v. *Capital Transit Co.*, 325 U.S. 357, at 361-362, 65 S.Ct. 1176, 89 L.ed. 1663 (1945), *Connecticut Co.* v. *Power Comm'er*, 324 U.S. 515, at 532, 65 S.Ct. 749, 89 L.ed. 1150 (1945), *Florida* v. *United States*, 282 U.S. 194, at 211-212, 51 S.Ct. 119, 75 L.ed. 291 (1931).

III.

The Idaho and Powell Cases Should Not Be Overruled.

Appellant contends, at pages 5-6 of its Jurisdictional Statement, that *Yonkers* v *United States*, 320 U.S. 685, 64 S.Ct. 327, 88 L.ed. 400 (1944), repudiates *United States* v. *Idaho*, 298 U.S. 105, 56 S.Ct. 690, 80 L.ed. 1070 (1936), and *Powell* v. *United States*, 300 U.S. 276, 57 S.Ct. 470, 81 L.ed. 643 (1937). The doctrine of those decisions is that the question decided by the lower Court herein is judicial, not administrative, and must be determined by a court rather than the Commission. Appellant then argues that the *Idaho* and *Powell* cases should be overruled, and it appears they must be if appellant is to prevail on this appeal.

The theory advanced in the Jurisdictional Statement is that, because *Yonkers* departed from the rule of *Idaho* and *Powell*, a question of the Commission's jurisdiction under sections 1(18)-1(22) is an administrative matter to be determined exclusively by the Commission. The theory has no merit.

Yonkers is not inconsistent with *Idaho* or *Powell*. Rather, it followed those two cases and reaffirmed that Congress did not leave the question exclusively to administrative determination but gave the courts the final say so. The issue in *Yonkers* was whether a section 1(18) order of the Commission was valid in the absence of a finding that the Commission had jurisdiction. This Court held only that the Commission itself should initially make a jurisdictional finding in order to give "added assurance that

the local interests for which Congress expressed its solicitude will be safeguarded" and to provide "the reviewing Courts the assistance of an expert judgment on a knotty phase of a technical subject." In other words, the courts will not approve a section 1(18) certificate issued without benefit of the Commission's judgment that such is legally required by section 1(18).

The *Yonkers* decision falls far short of holding that such a jurisdictional finding is an administrative determination exclusively for the Commission and one which the courts can strike down only if it is arbitrary, capricious or contrary to substantial evidence. In this litigation the decision of the District Court does not imply that the Commission's jurisdictional finding was not accorded all due weight and regard. Its entire opinion is devoted to that question, and there can be no doubt that the Commission's findings were seriously and painstakingly considered by the Court.

IV.

Appellant's Authorities Are Not In Point.

Appellant cites cases purporting to teach that the Interstate Commerce Commission, not the District Court, possessed the final responsibility to construe section 1(22) of the Interstate Commerce Act in the light of the facts regarding the Republic Junction connection. None of those cases, however, hold that the Commission may ultimately decide a question reserved by Congress to the courts. In each of them the Commission decided a matter expressly committed to its administrative judgment, and in none did the Commission decide a question of statutory construction.

United States v. *Pierce Auto Lines,* 327 U.S. 515, 66 S.Ct. 687, 90 L.ed. 821 (1946), concerned the applications of two motor carriers under Part II of the Interstate Commerce Act to extend their respective operations. The issue before the Commission was whether public convenience and necessity required the extensions. Such a question is completely factual, involves no interpretation of a statute, and is clearly a matter within the administrative competence of the Commission to decide. It was not by statute withheld from the Commission as is the issue of exclusion pursuant to section 1(22). The Commission's power to decide the question was not challenged at any stage of the litigation.

United States v. *Drum,* 368 U.S. 370, 82 S.Ct. 408, 7 L.ed. 2d 360 (1962), arose out of a Commission investigation pursuant to Part II of the Interstate Commerce Act, section 204(c), 49 Stat. 547, 49 U.S.C. 304(c), to determine whether certain carriers were contract carriers subject to section 209(a)(1) of the Act, 49 Stat. 552, 49 U.S.C. 309(a)(1). Section 204(c) specifically authorizes the Commission to make such an investigation and to decide whether a motor carrier has failed to comply with any provision of Part II. The resolution of such a question depends, not upon the application of a statute as does the issue under 1(18)-1(22), but upon facts which the administrative tribunal, not a court, has the necessary expertise to interpret. The Commission thus decided only a matter clearly within the scope of its mandate.

The question in *Shields* v. *Utah Idaho R. Co.,* 305 U.S. 177, 59 S.Ct. 160, 83 L. ed. 111 (1938), was whether the railroad company was exempt from the Railway Labor Act

because it was an interurban electric railway. Section 151 of that Act, 48 Stat. 1185, 45 U.S.C. 151, exempts such carriers from its provisions and explicitly commits to the Interstate Commerce Commission the duty to determine whether they are interurban electric railways. On that ground this Court, at page 185 of 305 U.S., distinguished the case then at bar from the section 1(18)-1(22) issue of the *Idaho* case:

> ". . . unlike the case presented in *United States* v. *Idaho*, 298 U.S. 105, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question . . ., the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission, the question on judicial review would be simply whether the Commission had acted within its authority."

In *State of Illinois* v. *United States*, 213 F. Supp. 83 (D.C.N.D. Ill., 1962), the Chicago, North Shore & Milwaukee Railway had applied to the Commission for a certificate permitting it to abandon its operations, and the Commission had granted the certificate sought. The State of Illinois alleged in the District Court that the railway was within the exception of section 1(22) of the Act because prior decisions of this Court held that the Railway fell within the exemption of section 20a of the Act, that it was an interurban electric railway within section 151 of the Railway Labor Act, and that it was such under section 77 of the Bankruptcy Act. The Court upheld the Commission's jurisdiction under section 1(18), stating at 213 F.Supp. 87-88:

> "It is apparent from the decisions following the Supreme Court North Shore case that exemptions sim-

> ilar to Section 1(22), but which are found in other provisions of the Interstate Commerce Act, or in other Acts, allow different interpretations, depending on; the purpose of the Act, the underlying issues, and the particular facts of the case."

The exception of section 1(22) is not to be read in *pari materia* with other acts providing for similar exceptions. Thus for valid authority appellant must rely only on decisions arising under sections 1(18)-1(22) of the Interstate Commerce Act.

United States v. *Jones*, 336 U.S. 641, 69 S.Ct. 787, 93 L.ed. 938 (1949), is a rate-making case, a subject manifestly within the power of the Commission. This Court observed, at 336 U.S. 651, 652, that the Railway Mail Pay Act, 39 Stat. 412, 39 U.S.C. 523-568, confers upon the Commission exclusive jurisdiction to fix reasonable rates for rail carriage of mail and that such a determination is essentially legislative, not judicial. The question on appeal did not concern the construction of a statute but only whether the Commission acted arbitrarily or unreasonably.

CONCLUSION.

Appellant's Jurisdictional Statement does not present the issue whether the Republic Junction connection is or is not a section 1(18) "extension" requiring a certificate of public convenience and necessity from the Interstate Commerce Commission. The lower Court decided that question in the negative, and appellant does not dispute the correctness of that determination. At issue on this appeal is whether the lower Court committed reversible error by exceeding its powers and encroaching upon the lawful prerogative of the Commission.

Appellant argues that *United States* v. *Idaho*, 298 U.S. 105, 56 S.Ct. 690, 80 L.ed. 1070 (1936), and *Powell* v. *United States*, 300 U.S. 276, 57 S.Ct. 470, 81 L.ed. 643 (1937), now should be overruled and "the law for once and all made clear." Those cases hold that the construction and application of sections 1(18)-1(22) of the Act is a judicial question for the courts rather than an administrative question for the Commission. Appellant disagrees and says these decisions were "gutted" and discarded by this Court in later cases, notably *Yonkers* v. *United States*, 320 U.S. 685, 64 S.Ct. 327, 88 L.ed. 400 (1944).

These decisions do not contradict each other, however, and there is no "more recent, line of cases" suggesting they are not still the law. The compatibility of this Court's decisions of section 1(18)-1(22) questions and the complete irrelevance of appellant's authorities makes it manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argu-

ment. Because no error of the lower Court has been shown and no substantial public question is involved, the judgment of the District Court should be affirmed.

Respectfully submitted,

PHILIP H. PORTER
708 First National Bank Bldg.
Madison 3, Wisconsin
JAMES P. CLANCEY
Peninsula Bank Building
Ishpeming, Michigan
Attorneys for the Lake Superior and Ishpeming Railroad Company
R. K. MERRILL
JOSEPH J. NAGLE
FRANK M. LONG
888 Union Station Bldg.
Chicago 6, Illinois
Attorneys for the Chicago, Milwaukee, St. Paul and Pacific Railroad Company
RICHARD R. ROBINSON
225 E. Mason Street
Milwaukee 2, Wisconsin
Attorneys for Plaintiffs-Appellees

January, 1964

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof properly addressed with postage prepaid by first-class mail to each such party.

Dated at Chicago, Illinois the ..... day of January, 1964.

.....

RAYMOND K. MERRILL